Supreme Court, U.S.
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No. 96-076

In The
Supreme Court of the United States
October Term, 1995

JACK G. SWISHER
Petitioner,

vs.

THE STATE BAR OF TEXAS
Respondent.

On Petition for Writ of Mandamus
To The
Supreme Court of Texas

BRIEF OF RESPONDENT

Respectfully submitted,

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STATEMENT OF THE CASE

A. Procedural History

This is a Texas attorney discipline matter arising from the professional misconduct of Petitioner, Jack G. Swisher ("Swisher"). On September 29, 1994, an Evidentiary Panel of the grievance committee for the State Bar of Texas, District 4I, entered a partially probated judgment of suspension from the practice of law against Swisher. Swisher appealed the judgment to the intermediary court of appeals, the Board of Disciplinary Appeals. The Board of Disciplinary Appeals affirmed the judgment on August 3, 1995, *without opinion.*

Swisher then appealed the judgment to the Texas Supreme Court which affirmed the judgment of suspension on April 12, 1996, *without opinion.* Swisher's motion for rehearing which raised new

claims was overruled by the Texas Supreme Court. Swisher attempted filing of a second motion for rehearing was rejected for filing by the Texas Supreme Court. The new claims raised in his motions for rehearing are in part the subject of his petition before this Court.

B. Statement of Facts

The Evidentiary Panel of the grievance committee, District 4I made the following findings of fact and conclusions of law:

> Jack Swisher is a licensed attorney and member of the State Bar of Texas, residing or maintaining an office in Houston, Harris County, Texas.
>
> On or about April, 1988, Johnny Fisk retained Swisher to prosecute a civil claim. Swisher failed to file a court ordered status report with the 127th Judicial District Court of Texas in Fisk's case, cause number 89-45593. As a result of Swisher's failure to file the status report, Fisk's case was dismissed by the Court on December 27, 1991, for want of prosecution.

Although Swisher was contacted by Fisk subsequent to the December 27, 1991, dismissal, Swisher failed to inform Fisk of the dismissal. Instead, Fisk discovered that his case had been dismissed on January 20, 1993, when he contacted the 127th Judicial District Court directly to ascertain the status of his case. Swisher further failed to respond to and return Fisk's phone calls upon Fisk learning of the dismissal.

Swisher's continued practice of law pending any appeals of this partially probated suspension poses a substantial threat of irreparable harm to Swisher's clients or prospective clients. The General Counsel of the State Bar of Texas has incurred reasonable attorney's fees and direct expenses associated with the proceedings of this matter in the amount of $2,770.00 which should be paid by Respondent.

The Evidentiary Panel concluded that the findings of fact support the following violations of Texas Disciplinary Rules of Professional Conduct:

1.01(b)(1) [In representing a client, a lawyer shall not neglect a legal matter entrusted to the lawyer]; and

1.03(a) [A lawyer shall keep a client reasonably informed about the status of a matter and promptly

comply with reasonable requests for information]. On the basis of these findings, the Evidentiary Panel entered a one (1) year suspension against Swisher, with the last seven (7) months probated.

OBJECTION TO JURISDICTION

Petitioner, Swisher, asserts jurisdiction pursuant to 28 U.S.C. §1257 and Rule 10.1(c) of the Supreme Court Rules. However, the Texas Supreme Court did not decide any question of federal law. In fact, it issued no opinion in connection with its affirmance of Swisher's judgment of suspension. Supreme Court Rule 10 (c). Furthermore, Swisher's argument regarding the validity of the disciplinary rules as violative of the American with Disabilities Act ("ADA") was not raised in the Texas Supreme Court until after the affirmance.

Finally, while couched in terms of constitutional deprivations, a review of the majority of Swisher's "Questions Presented" reveals nothing more than a dissatisfaction with the outcome of his disciplinary proceeding and the ensuing judgment of suspension. This petition is simply an attempt by Swisher to relitigate his disciplinary case.

On this basis alone, the petition should be overruled.

ARGUMENT

A. This Court lacks jurisdiction to consider the complaints raised in "Questions Presented" Nos. 4-10 because they involve an attempt by Swisher to relitigate his disciplinary case before this Court.

Although Swisher's arguments are couched in terms of constitutional deprivations, what Swisher truly seeks is another forum in which to relitigate the disciplinary proceeding which led to his suspension

from the practice of law. His petition is fraught with a rehash of his arguments made in the Texas courts including pleading defects, standard of proof, sufficiency of the evidence, interpretation of the disciplinary rules, retaliation by the grievance committee, the discipline assessed, and what he perceives to be the basis for the appellate courts decisions. (See "Questions Presented Nos. 4-10). These matters do not involve federal questions but rather reflect Swisher's desire to retry his case before this Court. This Court cannot reconsider these issues and the petition should be overruled.

B. Remaining Issues.

The only issues which could marginally be considered to involve the jurisdiction of this Court are those regarding the ADA, the Eighth Amendment, and the constitutionality of the specific

disciplinary rules. However, once again, given that the Texas Supreme Court issued no opinion in connection with its affirmance of Swisher's judgment of suspension, the Court did not render a decision involving a federal question or the validity of a state statute with federal constitutional implications.

However, these issues will each be addressed.

1. The Americans with Disabilities Act.

The American with Disabilities Act ("ADA") is inapplicable to lawyer discipline proceedings in this context. Swisher can point to no specific provision of the ADA which supports his position that the Act is violated by the assessment of discipline against a disabled lawyer who has committed professional misconduct.

The ADA was enacted to prevent discrimination against individuals with certain kinds of disabilities

in the areas of employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services. Title 42 U.S.C.A. §12101. None of these areas encompasses the conduct of the State Bar of Texas in carrying out its statutory duties and performing its regulatory functions with respect to lawyer discipline.

In addition, the ADA's focus is on employment, public services and access. The general rule of discrimination is that no "covered entity" (defined as an employer, employment agency, labor organization, or joint labor management committee) shall discriminate against a qualified individual with a disability in regard to job application procedures; the hiring, advancement, or

discharge of employees; employee compensation; job training; and other terms, conditions, and privileges of employment. Title 42 U.S.C.A. §12112. The State Bar of Texas does not fit in the definition of a "covered entity" in its relationship to Swisher. And while the vast majority of Swisher's practice may be in the area of worker's compensation, this fact does not transform Swisher into an employee of the State.

In the public services section, the ADA provides that no qualified individual with a disability shall be excluded from participation in or be denied the benefits of the services, programs, or activities of a "public entity" (defined as (A) any state or local government; and (B) any department, agency, special purpose district, or other instrumentality of a State or States or local government). Title 42 U.S.C.A. §12132. Swisher cannot argue that he

was denied the opportunity to defend himself against the allegations of misconduct in violation of the ADA. The Evidentiary Panel allowed Swisher to appear and defend himself via telephone at his request. Thus, the State Bar did not deny Swisher access to the process.

Rather, Swisher argues that the discipline imposed has a greater impact upon him as a disabled lawyer then upon a non-disabled lawyer. Swisher's argument is unrelated to the provisions of the ADA. Any lawyer subject to a suspension faces similar economic consequences as a result of his or her misconduct. Swisher's true complaint is that he was treated the same as any other lawyer who has committed professional misconduct and that his disabilities were not considered as mitigation in assessing discipline.

And yet Swisher offered no evidence of his disabilities at the hearing in consideration of mitigation. Arguing that the State Bar was on notice of his disabilities because of the payment of college tuition by the State, issuance of a handicapped drivers license, or the refund of taxes on the purchase of his car is nonsensical. And the fact that Swisher had previously appeared before the Grievance Committee "on some dozen prior occasions over the years, 4 or 5 of those video recorded" does not relieve him of the responsibility of putting forth evidence on his own behalf.

The cases cited by Swisher are inapposite. They either involve the giving of examination by law examiners, jury selection process, bar admissions, or employment situations.

Swisher's arguments the disciplinary rules themselves violated the ADA are matters that were not even considered by the Texas Supreme Court as this complaint was raised after the Court affirmed the judgment. Equally without merit is Swisher's contention that the Texas Supreme court's action of declining to hear oral argument violated the ADA. The decision of whether to grant oral argument in any case is purely discretionary.

2. The Eighth Amendment is inapplicable to disciplinary proceedings.

Swisher argues that the assessment of discipline amounts to cruel and unusual punishment in violation of the Eighth Amendment of the United States Constitution. This argument is without merit. The only application of the Eighth Amendment in a civil proceeding involved in rem civil forfeiture

proceedings (civil forfeiture of property involved in drug offenses) and in that instance the application of the Eight Amendment was limited to the excessive fine portion of the amendment. *Austin v. United States*, 113 S.Ct. 2801 (1993).

Moreover, disciplinary proceedings are not penal in nature, are not taken for the purpose of punishing the attorney, and are remedial in nature. *In Re Ament*, 890 S.W.2d 39 (Tex. 1994). See also *McInnis v. State*, 618 S.W.2d 389 (Tex. App. -- Beaumont 1981, writ ref'd n.r.e.) cert. den. 456 U.S. 976; *Bryant v. State*, 457 S.W.2d 72, 78-79 (Tex. Civ. App. – Eastland 1970, writ ref'd n.r.e.); *Ex Parte Wall*, 107 U.S. 265 (1883). The laws governing disciplinary action were designed to protect the public by eliminating from the legal profession those attorneys morally unfit to enjoy its

privileges. *Galindo v. State*, 535 S.W.2d 923, 925 (Tex. Civ. App. -- Corpus Christi 1976, no writ).

3. Rules 1.01(b)(1) and 1.03(a) are constitutional.

Swisher argues that Rules 1.01(b)(1) and 1.03(a) are unconstitutional for vagueness and overbreadth. First, Swisher did not raise this complaint either at the hearing before the Evidentiary Panel or before the Board of Disciplinary Appeals. Thus, he was precluded from raising this constitutional issue at the Texas Supreme Court. *Wood v. Wood*, 159 Tex.350, 320 S.W.2d 807, 813 (Tex. 1959); *Harris v. Windsor*, 156 Tex. 324, 294 S.W.2d 798, 799 (Tex. 1956).

In addition, Swisher's argument once again rests on his erroneous contention that the disciplinary proceedings are quasi-criminal in nature. *See State*

Bar of Texas v. Evans, 774 S.W.2d 656, 657 (Tex. 1989); *Polk v. State Bar of Texas* 480 F.2d 998, 1002 (5th Cir 1973). The cases cited by Swisher all involve criminal proceedings and thus are inapplicable to the case at hand.

Finally, a statute is fatally vague when persons regulated by it are exposed to some risk or detriment without fair warning of the nature of the proscribed conduct. *State Bar of Texas v. Tinning*, 875 S.W.2d 403, 408 (Tex. App. -- Corpus Christi 1994) (citing *Texas Liquor Control Bd. v. Attic Club, Inc.*, 457 S.W.2d 41, 45 (Tex. 1970)). Due process is violated only when a required course of conduct is stated in terms so vague that persons of common intelligence must guess at what is required or when there is a substantial risk of miscalculation by those whose acts are subjected to regulation. *Id.* at 408.

Statutes are not unconstitutionally vague simply because some difficulty is found in determining whether marginal offenses fall within their language. *Pennington v. Singleton*, 606 S.W.2d 682, 689 (Tex. 1980). In *Tinning*, *supra*, the court, in defeating a challenge to the constitutionality of former DR 3-102, stated:

> First, the factors listed in *Village of Hoffman Estates* militate in favor of a less stringent vagueness test. The rule is civil, not penal, in nature, and it regulates a profession whose members can be expected to consult applicable regulations and the writings of bodies empowered to interpret those regulations. Indeed, precisely by acquiring such expertise, lawyers hold themselves out as persons qualified to address the general public's legal needs, and the State justifies prohibiting unqualified persons from practicing law on the rationale that lay persons are not adequately trained to research the law or to provide the requisite level of service. A lawyer can inquire of other lawyers or ask the State Bar general counsel's office for help in interpreting the disciplinary rules.

Id. at 409.

The statutes in question here are constitutional.

CONCLUSION

Having failed to succeed on the merits in the Texas courts, Swisher continues in his attempt to couch this disciplinary proceeding as one involving the American with Disabilities Act ("ADA") plus a myriad of constitutional issues. In doing so, Swisher hopes to cloak this matter with significance beyond its merit. The ADA has no application to the context of this disciplinary proceeding nor are the Eighth or Fourteenth Amendments of the United States Constitution or Swisher's civil rights at issue.

This matter involves Swisher's neglect of his client's, Mr. Johnny Fisk, case. Swisher was at all times the attorney of record for Mr. Fisk. Swisher performed little work on behalf of Mr. Fisk and was responsible for Mr. Fisk's case being dismissed for

want of prosecution. And Swisher failed to inform Mr. Fisk that his case had been dismissed for want of prosecution. For this conduct, Swisher was properly disciplined.

PRAYER

WHEREFORE, PREMISES, ARGUMENTS AND AUTHORITIES CONSIDERED, Respondent prays that Petitioner's Petition for Writ of Certiorari be denied and for such other and further relief as this Court may deem proper.

Respectfully submitted,

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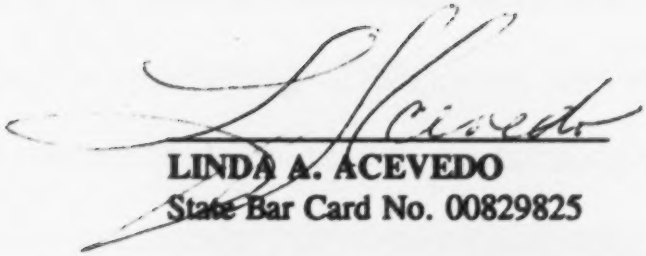

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ATTORNEY FOR RESPONDENT

CERTIFICATE OF SERVICE

This is to certify that the above and foregoing Brief of Respondent has been served on Jack G. Swisher, 1445 North Loop West, Suite 110, Houston, Texas 77008, by delivery of true and correct copies to them by certified mail, return receipt requested, by depositing the same, enclosed in a postpaid, properly addressed wrapper in an official depository under the care and custody of the United States Postal Service on the 14th day of August, 1996.

Linda A. Acevedo